Control Building Services, Inc. *and* Local 32B-32J, SEIU, AFL–CIO. Case 29–CA–23217–1

July 25, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On September 10, 2001, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order.[1]

The judge concluded that the Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily discharging employee Eddie McDonald on October 28, 1999.[2] In its exceptions, the Respondent contends that the judge erred in finding the violation because, inter alia, there is no evidence of antiunion animus against McDonald. In light of the Respondent's exception and because the judge failed to expressly make a finding of anti-union animus, we explicitly make this finding and clarify the basis for adopting the judge's conclusion. As we will explain, there is strong evidence here for finding animus: (1) the pretextual nature of the ostensible reasons for McDonald's discharge; (2) the timing of McDonald's discharge; and (3) Respondent's unlawful surveillance of employees.

The record shows that the Respondent is responsible for cleaning and maintaining the public areas of the Smith Haven and Roosevelt Field Malls. McDonald, a longtime cleaning employee for different contractors at the mall, operated a ride-on scrubbing machine on the Respondent's nightshift, from midnight until 8:30 a.m., at the Smith Haven Mall. In July, the Union began to organize the Respondent's Smith Haven and Roosevelt Field employees, and McDonald became an active supporter of the Union.

The Respondent was aware of McDonald's participation in the Union's organizing campaign. McDonald's signature appeared first in an "open letter" submitted in early August by a number of Smith Haven Mall cleaning employees to inform the Respondent that they were organizing for improved working conditions. On August 28, McDonald participated in a union leafleting campaign in front of the Smith Haven Mall witnessed by a supervisor for the Respondent, and, thereafter, wore a union hat and sticker until he was asked to remove them by his immediate supervisor, Gary Baumlin. On October 20, McDonald, acting on behalf of the mall employees, presented a letter condemning the Respondent employees' working conditions to the manager of the company that owned the Smith Haven Mall, and, 3 days later, he participated in a second leafleting campaign in front of the food court of the mall. Baumlin was present at both of these events.

On October 28 at 5:10 a.m., McDonald took a 1-hour break from his cleaning duties to recharge the scrubber in the garage, combining his lunch and break periods according to his usual practice. Baumlin, who had arrived at the Mall several hours before his usual arrival time, found McDonald asleep in the garage at 5:15 a.m. He did not awaken McDonald, and, upon seeing two other night-shift employees proceeding towards the garage at 5:50 a.m., he directed them to take their break in the lunchroom instead of the garage. At 6:08 a.m., Baumlin returned to the garage with a security guard and found McDonald still asleep. Again, Baumlin did not awaken him. At 6:40 a.m., Baumlin saw McDonald back out on the floor on the scrubber and told him that he wanted to see him at the end of his shift. At 8:15 a.m., Baumlin met with McDonald and terminated him for sleeping on the job.

The judge found that the Respondent's asserted reason for discharging McDonald on October 28 was pretextual. We agree. The immediate circumstances surrounding McDonald's discharge provide a strong basis "to infer [that] the Respondent seized on its own concoction as a pretext for discharging" him. *Pitt Ohio Express, Inc.*, 322 NLRB 867, 870 (1997); see also *Dravo Lime Co.*, 326 NLRB 1222, 1223–1224 (1998).

Baumlin explained that he arrived early to work on October 28 in order to assist the night shift, which was shortstaffed. Yet, when Baumlin found McDonald sleeping in the garage at 5:15 a.m. he did not awaken him. Moreover, in spite of the alleged staffing shortage, Baumlin admitted that he intentionally sent the two other night-shift employees for a break in an unaccustomed location, in order to prevent them from waking McDonald. These two employees had already taken their break an hour previously. Baumlin then sought out a security

[1] We shall modify the judge's recommended order in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (2001). Further, we shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB No. 29 (2001).

[2] Unless otherwise indicated, all dates are 1999.

guard and returned with him to the garage at 6:08 a.m., in order to have the guard witness McDonald sleeping.

Although sleeping on the job is forbidden under the Respondent's rules, Baumlin testified that employees were free to sleep during their breaktime. McDonald generally began his break at 5 a.m. and often napped until the other night shift employees awakened him by their return to the garage to clean their mops, usually before 6 a.m. Presumably, this is what would have occurred on October 28, had not Baumlin intervened. Hence, the judge correctly concluded that even assuming McDonald had slept beyond his breaktime as the Respondent stated in discharging him, "it was Baumlin who caused him to do so" because Baumlin was looking for a pretext to discharge McDonald.

The Board has found that such pretext evidence may be substantial evidence of anti-union animus. *Custom Top Soil, Inc.*, 327 NLRB 121 (1998) (adopting the judge's finding of discriminatory refusal to hire, while rejecting judge's basis for finding anti-union animus, because "[t]here remains substantial evidence of animus, particularly including the Respondent's . . . pretextual reasons for not hiring the discriminatees").

The timing of McDonald's discharge, 5 days after he was seen by his supervisor leafleting in front of the Smith Haven Mall and 8 days after he presented a letter protesting the Respondent employees' working conditions to the mall owner in his supervisor's presence, further supports the inference that the Respondent acted out of animus against McDonald's protected activity. See, e.g., *Sears, Roebuck & Co.*, 337 NLRB No. 65, slip op. at 2 (2002).

Moreover, the judge's finding that, on August 18, a group of the Respondent's supervisors engaged in unlawful surveillance of several employees by staring at them through the plate glass window of a mall restaurant as they met with union organizers inside, supports a finding of antiunion animus.[3] *Farm Fresh, Inc.*, 301 NLRB 907 (1991) (stating that "the unfair labor practices found by the judge, which we adopt, establishes [sic] the Respondent's antiunion animus," and specifying "in this regard, the Respondent's surveillance of the union activities of [its employees]"); *Parsippany Hotel Management Co.*, 319 NLRB 114, 129 (1995).

We therefore agree with the judge that the General Counsel met his burden of demonstrating that the Respondent's termination of McDonald was motivated by his union activity. We find that the Respondent failed to rebut that presumption because the Respondent's only explanation for its action was blatantly pretextual. Accordingly, we adopt the judge's conclusion that the Respondent discriminatorily discharged McDonald in violation of Sections 8(a)(1) and (3) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Control Building Services, Inc., Secaucus, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order, as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days from the date of this Order, offer Edward McDonald full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed."

2. Insert the following paragraph as 2(b) and reletter the subsequent paragraphs.

"(b) Make Edward McDonald whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision."

3. Substitute the following for relettered paragraph 2(d).

"(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records, and all other records, if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

4. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C., July 25, 2002

_____
Peter J. Hurtgen, Chairman

_____
Wilma B. Liebman, Member

_____
Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[3] While acknowledging that the managers would have committed no violation "had [they] come to see whether the employees were on duty and then left" as the Respondent alleged, the judge found that "[t]hat would have taken a minute or two." Instead, the supervisors remained outside the restaurant looking in at the meeting for 10 to 15 minutes, according to testimony of several of the Respondent's supervisors, which the judge credited.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT engage in the surveillance of employees' protected activities.

WE WILL NOT discharge employees for activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Edward McDonald full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges enjoyed.

WE WILL make Edward McDonald whole for any loss of earnings and benefits he may have suffered, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of McDonald and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

CONTROL BUILDING SERVICES, INC.

James P. Kearns, Esq., for the General Counsel.
Gregory R. Begg, Esq. (Peckar & Abramson), for the Respondent.
Rebecca A. Schleifer, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in New York City, New York, on May 23–25 and the record was closed on June 11, 2001. Upon a charge filed on December 23, 1999,[1] an amended complaint was issued on March 13, 2001, alleging that Control Building Services, Inc. (Respondent or Control) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on August 10, 2001.

Upon the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Jersey corporation, with its principal office and place of business in Secaucus, New Jersey, is engaged in providing maintenance and janitorial services for shopping malls and office buildings located in New Jersey and New York. It has been admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that Local 32B-32J, SEIU, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Respondent provides maintenance and janitorial services for various shopping malls located in New York and New Jersey. In July 1999, the Union commenced an organizing campaign among Respondent's employees at four malls in Long Island, New York, including Roosevelt Field Mall and Smith Haven Mall. The complaint alleges that Respondent engaged in surveillance of its employees at the Roosevelt Field Mall on August 19, and on October 28 discharged Edward McDonald, who was employed at the Smith Haven Mall.

2. McDonald's union activities

On August 2, McDonald and a number of employees at Smith Haven Mall signed an "open letter" to Respondent. McDonald's name appeared first among the signatures. The letter advised Control that the workers were organizing for "better wages, dignity, and respect." On August 28, McDonald and three coworkers distributed union leaflets at the mall. The mall was owned by Simon Property Group. The leaflets stated "Ask Simon administration to do the right thing. Ask them why they are using a contractor that is unfair to workers." Al Snickers, a Control supervisor, was present when the employees were handing out the leaflets.

After the leafleting on August 28, McDonald began wearing a union hat and sticker to work. Gary Baumlin, the Smith Haven housekeeping director, told McDonald to remove the hat

[1] All dates refer to 1999 unless otherwise specified.

and sticker. On October 12, a newspaper article appeared in Newsday. The article was entitled "Janitors Allege Unfair Treatment" and it had a photograph of McDonald and two other employees.

On October 20, McDonald and six co-workers signed a letter addressed to Jim Lundgren, manager of Simon Property Group. McDonald's name appeared first among those signing the letter. The letter listed what the employees regarded as poor conditions at the Smith Haven Mall, including "roaches in the food court area." The employees met with Lundgren and McDonald served as spokesman. Baumlin and Robert Hennessy, Respondent's facilities manager at Smith Haven, were present. Attached to the letter was the "open letter" dated August 2. In addition, in Baumlin's presence, McDonald presented Lundgren photographs of the alleged poor conditions.

On October 23, McDonald and several co-workers distributed a leaflet at the food court entrance. The leaflets showed pictures of roaches and stated "Here's what Control workers—the cleaning contractor at Smith Haven mall—face when we take our lunch breaks!" Hennessy drove past the employees when they were leafleting. McDonald testified that someone screamed "you ought to fire these f— people." When asked who made that statement, McDonald testified that "it had to be Bob Hennessy." On cross-examination McDonald conceded that he did not "see him say it." Michael Trombino, a security guard, testified that he did not hear Hennessy make the alleged statement. In addition, Hennessy denied making the statement.

3. Surveillance

The complaint alleges that on August 18 Respondent engaged in surveillance of employees' union activities at Roosevelt Field Mall. On that day Kevin Stavris, a union representative, and Francisco Chang, the lead union organizer, met with approximately eight employees at Sbarro's restaurant in the mall. Tony Della Bovie, Andrew Mongiardo, and Ceasar Pina, all Control managers, were standing outside the windows of Sbarro's. They could clearly see the employees and the employees could clearly see them. Stavris testified that the managers were standing there for 10 to 15 minutes. He also testified that Mongiardo was "writing down names of the people that were there." Mongiardo testified that he went to see "if any of my people were on duty." He testified that they stayed there for about 10 minutes but that he did not write down the names of the employees. Della Bovie, Control's vice president of operations, testified that he and Mongiardo went there to see if there is "anybody there who should be out on the floor working." He further testified that after they determined that the employees were all off-duty, they left. He testified that Mongiardo did not write down the names of the employees.

4. Discharge of McDonald

McDonald had worked at the Smith Haven Mall for different cleaning contractors for approximately 14 years. Control became the contractor in March 1999. Prior thereto Planned Building Services was the contractor. Baumlin had been McDonald's supervisor at Planned Building Services and was also his supervisor at Control.

McDonald operated a ride-on scrubbing machine. His hours were from midnight until 8:30 a.m. Also working the same shift were Fernando Beltran and Joe Garcia. It was customary for Beltran and Garcia to take a break from 4 until 5 a.m. While Baumlin testified that they were not entitled to such a long break, I credit Beltran's testimony that, in fact, it was their custom to combine their breaks with the lunch period, and take one long rest period from 4 until 5 a.m.

McDonald was the night supervisor. The scrubber required recharging at around 5 a.m. He testified that he regularly combined his lunch period with the two 15-minute breaks and took one long rest period which lasted from approximately 5 to 6 a.m. While, again, Baumlin testified that McDonald was not entitled to such a long break, I credit McDonald's testimony that the custom had been for him to take a break from 5 to 6 a.m., during which time he recharged the scrubbing machine in the garage.

McDonald would often nap during his break. While he was taking his nap the other employees would be cleaning the bathrooms. Customarily, at approximately 5:55 each morning the other employees would come to the garage to clean their mops. If McDonald were still napping, the other employees' arrival would wake him. It would then take McDonald approximately 20 minutes to clean and refill the scrubber.

On October 28, McDonald started his break at 5:10 a.m. I credit Beltran's testimony that Baumlin usually came to work around 7:30 a.m. and very rarely came before that time. On October 28, however, Baumlin came to work at 5 a.m. He went into the garage at 5:15 and saw McDonald sleeping. At 5:50 as Beltran and Garcia were proceeding towards the garage Baumlin stopped them. Baumlin told them to take a break, not in the garage, but in the lunchroom. They had never previously taken a break in the lunchroom. They left the lunchroom at 6:40 and Beltran credibly testified that he saw McDonald riding the scrubber at 6:43.

Steven Rinchey was a security guard on duty that morning. Baumlin asked Rinchey to accompany him and at 6:08 a.m. they entered the garage and saw McDonald still sleeping. Baumlin did not wake him. Baumlin testified that he reentered the garage at 6:35 and McDonald was still sleeping. I do not credit that testimony. Baumlin saw McDonald on the scrubber at 6:40. Inasmuch as it takes approximately 20 minutes to clean and refill the scrubber, McDonald would have had to awaken not later than 6:20. In addition, Beltran saw McDonald on the scrubber at 6:43. At 6:40, when Baumlin saw McDonald on the scrubber, he told him that he wanted to see him at the end of his shift. At 8:15 a.m. Baumlin told McDonald that he was terminated for sleeping on the job.

B. Discussion and Conclusions

1. Surveillance

On August 18 several Union representatives met with approximately eight employees. The meeting was held at Sbarro's restaurant, which is located at the Roosevelt Field Mall. Several Control managers were standing outside the windows of the restaurant. They could clearly see the employees inside the restaurant. I credit Stavris' and Mongiardo's

testimony that the managers were standing there for 10 to 15 minutes. Mongiardo and Della Bovie testified that they came to see if any of the employees were supposed to be on duty. They determined that the employees were all off-duty. While Stavris testified that Mongiardo wrote down the names of the employees, I do not credit that testimony. Mongiardo and Della Bovie denied it and I believe that Stavris was not close enough to see what, if anything, was being written.

Surveillance is not per se unlawful. See *Cal Spas*, 322 NLRB 41, 57 (1996), enf. granted in part and denied in part on other grounds 150 F.3d 1095 (9th Cir. 1998). Thus, had the managers come to see whether the employees were on duty and then left, I do not believe that that would have constituted a violation. That would have taken a minute or two. Indeed, Della Bovie testified that they looked into the restaurant for only 2 minutes. I have credited Stavris and Mongiardo and find, however, that the managers stood there, observing the employees, for 10 to 15 minutes. This, I believe constitutes unlawful surveillance. See *Farm Fresh, Inc.*, 301 NLRB 907 (1991).

2. Discharge of McDonald

On August 28, McDonald and several co-workers distributed Union leaflets at the Smith Haven Mall. Al Snickers, a Control supervisor, was present. Subsequent to that McDonald began wearing a Union hat and sticker and was told by Baumlin to remove them. On October 12, a newspaper article appeared entitled "Janitors Allege Unfair Treatment." McDonald's photograph appeared in the article.

On October 20 McDonald and six co-workers signed a letter deploring conditions at the Smith Haven Mall. McDonald's name appeared first among those signing the letter. McDonald served as spokesman when meeting with Lundgren, Simon's manager. Baumlin and Hennessy were present. On October 23, McDonald and several coworkers distributed leaflets at the food court entrance. The leaflets showed pictures of roaches and stated "Here's what Control workers . . . face when we take our lunch breaks!" Hennessy observed the leafleting. In addition, Baumlin was asked if he knew, at the time of the discharge, whether McDonald supported the Union. He testified that he knew that McDonald was a Union supporter.

On October 28, Baumlin came to work at 5 a.m. He regularly did not come to work before 7:30. At 5:15 he went into the garage and found McDonald asleep, but did not wake him. At 5:50, as Beltran and Garcia were proceeding towards the garage, Baumlin intercepted them. He told them to take a break, even though they had already had their break an hour earlier. He told them specifically not to go into the garage, but instead to take their break in the lunchroom, something that they had never previously done.

Baumlin then asked Rinchey to accompany him to the garage. They entered the garage at 6:08 and found McDonald asleep. Again, Baumlin did not wake him. While Baumlin testified that he found McDonald still sleeping at 6:35, I do not credit that testimony. Baumlin testified that he saw McDonald on the scrubber at 6:40 and Beltran, whom I credit, testified that he saw McDonald on the scrubber at 6:43. Since it takes 20 minutes to clean and refill the scrubber, McDonald would have had to be awake by 6:20.

As detailed above, McDonald was an active Union supporter and this was known to Respondent. Just 5 days earlier, on October 23, McDonald distributed leaflets at the mall with pictures of roaches, stating that this is what "Control workers . . . face when we take our lunch breaks." I find that Baumlin was looking for a pretext to discharge McDonald. On October 28 Baumlin came to work 2-1/2 hours earlier than he normally did. Even though he testified that he came in early to help clean because the night crew was missing an employee, Baumlin did not wake McDonald at 6:08. Instead, he had Rinchey accompany him to verify the fact that McDonald was asleep. Indeed, at 5:50 Baumlin intercepted Beltran and Garcia and instructed them to not go to the garage, so that they wouldn't wake McDonald. And, even though Baumlin said that he was concerned that the staff was short an employee, he sent Beltran and Garcia on a 45-minute break, although they had just had their break an hour earlier.

Hennessy conceded that employees could sleep on their breaks. Respondent contends, however, that McDonald slept beyond his breaktime. I have found that McDonald's breaktime was approximately 5 to 6 a.m. On October 28, he began his break at 5:10. He was still asleep at 6:08. But, it is not clear from the record when he awoke. I find that he left the garage not later than 6:20. Respondent has not proven that he slept for more than 1 hour. It is possible that when Baumlin and Rinchey came into the garage at 6:08, McDonald may have heard them and he awoke. In that case he would have been asleep for 58 minutes, 2 minutes shy of the permissible breaktime of 1 hour.

I find that the reason given for the discharge, namely, sleeping on the job, was a pretext. Even if McDonald had slept for more than 60 minutes, it was Baumlin who caused him to do so. Beltran and Garcia normally woke McDonald between 5:50 and 5:55. But on the day of the discharge Baumlin prevented that from happening. As stated in *Scientific Ecology Group*, 317 NLRB 1259, 1263 (1995):

> The most reasonable interpretation under the evidence is that management was going to retaliate against Davis because of his union activities whenever an opportunity arose to do so. Davis presented this opportunity when he went to sleep, and his sleep would serve as a golden pretext to mask the real motive.

See also *Circuit-Wise, Inc.*, 306 NLRB 766, 790 (1992); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

My finding of pretext is also consistent with the Board's analysis in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The General Counsel has made a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Respondent's decision to terminate McDonald. Respondent contends that it has a rule against sleeping on company time. In the first place, it has not been proven that McDonald slept for more than 60 minutes. In addition, the record shows that employee Ramon Matos was missing for 1-

1/2 hours. Yet, he was not discharged, but was instead issued a written warning. I find that, pursuant to *Wright Line*, supra, Respondent has not satisfied its burden of demonstrating that the "same action would have taken place even in the absence of the protected conduct." Accordingly, I find that by discharging McDonald on October 28 Respondent has committed an unfair labor practice, in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By engaging in surveillance of employees' union activities Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.
4. By discharging Edward McDonald on October 28, 1999, and failing to offer him reinstatement, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.
5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Control Building Services, Inc., its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Engaging in the surveillance of employees' protected activities.

(b) Discharging employees for engaging in protected activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days from the date of this Order, offer Edward McDonald full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify McDonald in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facilities in Long Island, New York, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 18, 1999.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 10, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT engage in the surveillance of employees' protected activities.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT discharge employees for activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Edward McDonald full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and benefits he may have suffered, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of McDonald and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

CONTROL BUILDING SERVICES, INC.